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Watkins v. U.S. Army and Bowers v. Hardwick: Are Homosexuals a Suspect Class or Second Class Citizens?

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Watkins v. U.S. Army and *Bowers v. Hardwick*: Are Homosexuals a Suspect Class or Second Class Citizens?

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I. INTRODUCTION

Cultural bias, statutory law, and case law have severely restricted the relative rights of homosexuals in this country. "Paralleling the *Black Experience* in America, homosexual persons have been systematically denied fundamental liberties extended to all other individuals."¹ Gays and lesbians have experienced discrimination in diverse areas including business, public housing, insurance, credit, immigration, parenting, and marriage. They have also been denied professional licenses and security clearances.²

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1. Comment, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829, 830 (1987). See also Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980).
 2. Comment, *supra* note 1, at 830-32 nn.13-25. See Karst, *supra* note 1, at 682-86 for a discussion of the loss of fundamental material benefits which necessarily results from the denial of legal marital status to homosexual couples.

In *Bowers v. Hardwick*,³ a 1986 homosexual rights decision, the United States Supreme Court, by a 5 to 4 margin, determined that a state statute which criminalized acts of sodomy between consenting adults was constitutional (at least as applied to homosexual sodomy). In *Watkins v. U.S. Army*,⁴ the Ninth Circuit Court of Appeals recently attempted to minimize the damage to civil rights done by *Hardwick*. This Note first presents the facts, reasons, and holdings of *Hardwick* and *Watkins*. The Note then demonstrates that both opinions grossly manipulated precedent to achieve what each court felt was a just result. Finally, the Note examines the dichotomy of judicial philosophy represented by the cases: *Hardwick* sanctioned the legal abuse of homosexuals in the name of a majoritarian notion of sexual morality, while *Watkins* attempted to protect that same minority from persecution by fashioning a just result despite unjust precedent.

II. THE CASES

A. *Bowers v. Hardwick*

Hardwick, after being charged with violation of Georgia's anti-sodomy law, challenged the constitutionality of the Georgia statute.⁵ The Court construed the issue narrowly, determining "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."⁶

In a decision which has been criticized for a lack of principled analysis,⁷ the Court refused to extend constitutional privacy protection to

3. 106 S. Ct. 2841 (1986)(also reported at 478 U.S. 186, preliminary printing), *reh'g denied*, 107 S. Ct. 29 (1986). For a listing of 21 states which have decriminalized sodomy and a brief description of the sodomy statutes of 24 states, see Note, *Behind the Facade: Understanding the Potential Extension of the Constitutional Right to Privacy to Homosexual Conduct*, 64 WASH. U.L.Q. 1233, 1234, 1235 nn.8-9 (1986). (Note that a few states proscribe only homosexual sodomy.)

4. 847 F.2d 1329 (9th Cir. 1988), *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988).

5. Sodomy, under the Georgia statute, is any sexual act involving the sex organs of one person and the mouth or anus of another. The penalty is one to 20 years imprisonment. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). Hardwick challenged the statute even though the State did not seek prosecution. After dismissal for failure to state a claim, Hardwick appealed. The Court of Appeals for the Eleventh Circuit reversed, holding that the ninth amendment and the due process clause of the fourteenth amendment proscribed state regulation of the "private and intimate association" of homosexual activity. *Id.* at 2843. The court remanded the case—the state would have to show that the statute was the most narrowly drawn means of achieving a compelling government interest. *Id.* The Supreme Court granted certiorari and reversed.

6. *Id.*

7. See, e.g., Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54

the private, intimate behavior of homosexuals.⁸ The Court rejected the court of appeal's reasoning that Supreme Court precedent had created a constitutional right of privacy which extends to homosexual sodomy.⁹ The Court indicated that the right of privacy extends only to matters of family, marriage, and procreation:¹⁰

No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unworkable.¹¹

Furthermore, the Court determined that the occurrence of sodomy in the privacy of the home did not insulate it from state proscription. *Stanley v. Georgia*,¹² which held that conviction for possession of obscenity in the home was unconstitutional, was declared inapplicable because that holding was "firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution."¹³ The majority also noted that other *victimless* crimes such as possession of drugs, firearms, and stolen goods in the home are not constitutionally protected.¹⁴ The Court concluded: "[it] would be difficult, except by fiat, to limit the claimed right [of adult, consensual sexual conduct] to homosexual conduct while leaving exposed to prosecution, adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."¹⁵

In addition to its determination that recent precedent confers no right to engage in intimate homosexual conduct, the majority relied on the history of homosexual discrimination to justify its holding. "Pro-

U. CHI. L. REV. 648 (1987); Note, *Bowers v. Hardwick: An Incomplete Constitutional Analysis*, 65 N.C.L. REV. 1100 (1987).

8. The Court specifically declined to address the constitutionality of criminalization of private, consensual acts of sodomy between married or unmarried heterosexual couples. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843 (1986). John and Mary Doe, plaintiffs in the original action, also challenged the constitutionality of the statute. They alleged that the statute and Hardwick's arrest "chilled and deterred" their freedom to engage in such activity. The district court held that the Does had no standing and the court of appeals affirmed. The Does did not challenge the denial of standing before the Supreme Court. *Id.* at 2842 n.2.
9. *Id.* at 2843.
10. The Court distinguished the line of cases relied on by the court of appeals as dealing only with child rearing and education, family relationships, procreation, marriage, contraception, and abortion. *Id.* at 2843-44.
11. *Id.* at 2844.
12. 394 U.S. 557 (1969).
13. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986).
14. *Id.*
15. *Id.* The Court, by implication, saw no material distinction between private homosexual sodomy by consenting adults and acts of incest and adultery.

scriptions against [homosexual sodomy] have ancient roots."¹⁶ In response to Hardwick's assertion that there must be at least a rational basis for the law and that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is an inadequate rationale, the Court declared: "We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis."¹⁷

The *Hardwick* majority did not consider the equal protection clause in its analysis. In *Watkins v. U.S. Army*,¹⁸ the Ninth Circuit Court of Appeals did consider an equal protection challenge to regulations which banned homosexuals from the United States Army. The court held the regulations were unconstitutional.

B. *Watkins v. U.S. Army*

Watkins enlisted in the Army in 1967 at the age of nineteen. He indicated to the Army at that time that he had homosexual tendencies. Watkins served fourteen years (1967-1981). His homosexuality was common knowledge. Prior to 1981, the Army made numerous investigations of Watkins's homosexual conduct. He was cleared on every occasion and received high ratings throughout his career. His superior officers testified that he was an excellent officer and that his known homosexuality did not disrupt Army affairs. In 1980, however, Watkins's security clearance for a particular project was withdrawn due to his homosexuality, and in 1981 the Army created new regulations which required the discharge of all homosexuals regardless of merit and barred their reenlistment.¹⁹ The Army then discharged Watkins because he had stated that he was homosexual.²⁰ Watkins filed suit in district court where the Army was enjoined from discharging him. The court held the discharge was barred by the Army's regulation against double jeopardy. (Discharge proceedings had been brought in 1975.)

The Army subsequently denied Watkins's reenlistment application²¹ and was again enjoined by the district court. On appeal, the

16. *Id.* at 2844. See also Chief Justice Burger's concurring opinion, *id.* at 2847.

17. *Id.* at 2846-47.

18. 847 F.2d 1329 (9th Cir. 1988), *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988).

19. *Watkins v. U.S. Army*, 847 F.2d 1329, 1332-33 (9th Cir. 1988). The regulations are AR 635-200, Ch. 15 (discharge) and AR 601-280, ¶ 2-21(c) (reenlistment). See *id.* at 1336 n.11 for relevant sections of these regulations.

20. *Id.* at 1332. Supplementary findings by the Army that Watkins had engaged in homosexual acts with other soldiers after 1968 were ruled invalid. On appeal, the Army only cited Watkins's 1968 affidavit as evidence of homosexual conduct. *Id.*

21. AR 601-280, ¶ 2-21(c) bars reenlistment of homosexuals. Watkins's 1968 affidavit admitting to homosexual acts is the only evidence the court of appeals accepted regarding the Army's finding of homosexual conduct. *Watkins v. U.S. Army*, 847 F.2d 1329, 1332 (9th Cir. 1988).

Ninth Circuit reversed, holding that the Army could not be ordered to violate its own regulations absent a finding that the regulations were unconstitutional.²² On remand, the district court granted summary judgment for the Army and Watkins appealed.

The court of appeals first disposed of Watkins's administrative procedure, petition clause, and due process entrapment claims.²³ Watkins's first amendment claim was dismissed because the Army's determination of his homosexuality was based, in addition to his admission of being gay, on his 1968 admission to engaging in homosexual acts.²⁴

The court then addressed Watkins's fifth amendment equal protection claim. The court conceded that *Bowers v. Hardwick* and its own precedent precluded a finding under "a due process or equal protection claim that the Army's regulations impinge on an asserted fundamental right to engage in homosexual sodomy."²⁵ However, the court reasoned that unlike the Georgia sodomy statute in *Bowers v. Hardwick*, the Army regulations discriminated against homosexuals based on their sexual orientation.²⁶ Because the focus of the regulations was found to be sexual orientation rather than conduct, the court applied equal protection analysis to the regulations:

First, we must decide whether the regulations in fact discriminate on the basis of sexual orientation. Second, we must decide which level of judicial scrutiny applies by asking whether discrimination based on sexual orientation burdens a suspect or quasi-suspect class, which would make it subject respectively, to strict or intermediate scrutiny. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-41, 105 S. Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). If the discrimination burdens no such class, it is subject to ordinary rationality review. *Id.* Finally, we must decide whether the challenged regulations survive the applicable level of scrutiny by deciding whether, under strict scrutiny, the legal classification is necessary to serve a compelling governmental interest²⁷

The court first concluded that the Army regulations did discriminate against homosexuals based on their sexual orientation. The regulations provided for discharge or denial of reenlistment application based on either homosexual conduct or admitted homosexual orienta-

22. *Id.* at 1334.

23. *Id.*

24. *Id.* at 1334-35.

25. *Id.* at 1345. The court's precedent referred to is *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981) and *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981). The court distinguished *Beller* as a substantive due process case. *Hatheway* dealt with only the first of two equal protection questions. The case foreclosed a finding that the regulations impinge on any fundamental right to engage in homosexual conduct, but did not foreclose a finding that homosexuals are a suspect or quasi-suspect class. *Watkins v. U.S. Army*, 847 F.2d 1329, 1342 (9th Cir. 1988).

26. *Watkins v. U.S. Army*, 847 F.2d 1329, 1337 (9th Cir. 1988).

27. *Id.* at 1335-36 (footnotes omitted).

tion; however, the court reasoned that a finding of homosexual conduct was merely used as an indicator of homosexual status. The intent of the discharge and reenlistment regulations was to ban homosexually oriented persons from the Army.²⁸

The court then considered the factors which the Supreme Court has declared pertinent to a suspect class inquiry and concluded:

(1) Homosexuals have "suffered a history of purposeful discrimination." This discrimination has been similar to that faced by other groups considered to be suspect classes such as aliens and persons of a particular national origin.²⁹

(2) "[T]he discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious."³⁰ This conclusion was based on findings that: (a) "[s]exual orientation plainly has no relevance to a person's 'ability to perform or contribute to society;'"³¹ (b) homosexuals as a class have suffered unique disabilities due to irrational prejudice;³² (c) the trait which defines the class, sexual preference, is immutable.³³

(3) Homosexuals, as a group, lack the political power to effectively advocate a redress of official discrimination.³⁴

The court concluded that homosexuals are a suspect class. The regulations were therefore subjected to strict scrutiny, under which they could be upheld only if necessary to promote a compelling government interest.

The court determined that the Army's justifications were not compelling "because they illegitimately cater to private biases."³⁵ The Army's assertion that heterosexual bias against homosexuals within its ranks is disruptive and therefore justifies exclusion of homosexuals was compared to earlier efforts by the Army to separate blacks due to racial tensions. "[T]he Supreme Court has decisively rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those prejudices create real and legitimate problems."³⁶ Similarly, in response to the Army's assertion that its regulations merely codify society's consensus that homosexuality is evil, the court stated: "Yet, even accepting *arguendo* this proposition that anti-homosexual animus is grounded in morality (as opposed to prejudice masking as morality), equal protection doctrine does not

28. *Id.* at 1336-39. For relevant sections of the Army's discharge and reenlistment regulations, see *id.* at 1336, n.11.

29. *Id.* at 1345.

30. *Id.* at 1346.

31. *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

32. *Id.* at 1346-47.

33. *Id.* at 1347-48.

34. *Id.* at 1348-49.

35. *Id.* at 1350.

36. *Id.* at 1350-51 (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against suspect classes."³⁷

The court briefly considered the Army's claims that emotional relationships between homosexuals of different rank would erode discipline and that homosexual soldiers would be susceptible to blackmail and thereby constitute a security risk. The regulations were found to be poorly tailored to advance the Army's interest in avoiding such risks.³⁸

The court concluded that the Army regulations discriminated against a suspect class, were not necessary to promote a compelling government interest, and violated the constitutional guarantee of equal protection of the laws. The case was remanded to the district court with instructions to declare the regulations constitutionally void. The order also authorized an injunction to require the Army to disregard Watkins's sexual orientation in its consideration of his reenlistment application.³⁹

III. THE GROSS MANIPULATION OF PRECEDENT BY *HARDWICK AND WATKINS*

Both *Hardwick* and *Watkins* are opinions tainted by prior precedent. The Supreme Court's privacy cases indicate that private sexual conduct between consenting adults should be protected from government scrutiny. Yet *Hardwick* holds to the contrary (at least in the case of homosexual sexual conduct). *Watkins* holds that homosexuals are a suspect class under the equal protection clause; however, *Hardwick* seems to preclude such a finding. In both cases, prior precedent was distinguished and manipulated to achieve what each court felt was the correct result.

In another respect, however, the cases stand in stark contrast. In *Hardwick*, the Supreme Court sanctifies laws made in the name of majority morality which necessarily impact in a harsh manner on a historically persecuted minority. By implication, the prejudice and bias of a perceived majority are sufficient reasons to justify such laws. In *Watkins*, however, the Ninth Circuit Court of Appeals attempted to distinguish the difficult precedent of *Hardwick* in order to protect that same persecuted minority from majority abuse. This contrast in purpose of the *Hardwick* and *Watkins* courts reflects a fundamental philosophical dichotomy regarding the proper mandate of the courts. The *Watkins* holding also illustrates another central theme of American judicial history: sometimes the courts manage to achieve a just result despite bad law.

37. *Id.* at 1351.

38. *Id.* at 1352.

39. *Id.* at 1353.

A. *Hardwick* and the Right of Privacy

The source and substance of a constitutional right of privacy is an intensely debated issue. Strict constitutional constructionists argue that no provision of the document explicitly provides a right of privacy, while others have found support for such a right in various provisions of the Constitution and in the intent of the founding fathers.⁴⁰ The *Hardwick* majority clearly placed itself on the conservative side of the debate:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.⁴¹

The Court, however, is saddled with its own line of cases which extends the right of privacy beyond any specific textual provisions of the Constitution.⁴²

The majority argument is flawed in at least two respects. First, the Court selectively relied on the language of two of its privacy cases to define the reach of the right to privacy. The Court declared the reach of the right to privacy to be confined to those "liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty or justice would exist if [they] were sacrificed,'"⁴³ and as those liberties which are "'deeply rooted in this Nation's history and tradition.'"⁴⁴ The Court found that these formulas confer no right of privacy to the private sexual conduct of homosexuals since "[p]roscriptions against that conduct have ancient roots."⁴⁵ Language in other Court opinions, however, indicates that the proper reach of the right of privacy is grounded in other concerns: the value of individual autonomy, the freedom to define one's own identity, individual happiness, personal control of intimate associations, and the right secured by the fourth amendment—to be secure in one's home from unwarranted government intrusion.⁴⁶

40. For a brief history of the evolution of a constitutional right of privacy, see Watson, *The Ninth Amendment: Source of a Substantive Right to Privacy*, 19 J. MARSHALL L. REV. 959 (1986).

41. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986).

42. For a listing of the cases, see *id.* at 2843. The Court extended protection for possession of obscene material in the home in *Stanley v. Georgia*, 394 U.S. 557 (1969). The *Hardwick* majority argued that *Stanley* was grounded in the first amendment and therefore did not support *Hardwick's* privacy claim; however, Justice Blackmun pointed out that *Stanley* was indeed decided on privacy grounds. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2852 (1986) (Blackmun, J., dissenting).

43. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

44. *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

45. *Id.*

46. See *id.* at 2850-53 (Blackmun, J., dissenting). John Stuart Mill long ago argued

In its effort to halt the flow of *illegitimate* privacy rights, the Court awkwardly attempted to confine the rights conferred by this line of cases to the narrow fact patterns of the cases themselves. "[N]one of the rights announced in these cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."⁴⁷

Surely, however, the right of sexual intimacy is as necessary for individual liberty as the right to use contraceptives, to possess obscenity in one's home, or to choose an abortion.⁴⁸ Despite presumed notions of majority morality, and a long history of public abhorrence of the act,⁴⁹ the Court has recognized a woman's right to choose an abortion. The right to choose whether to bear a child has no explicit textual support in the Constitution. The right is based on recognition of the importance of individual autonomy—the right to control one's own body. This same interest justifies recognition of the right of homosexuals to engage in private, consensual acts of sodomy. Indeed, the right to choose an abortion is less compelling because abortion is not a victimless act. The *Hardwick* Court's analysis, or lack of analysis, is tainted by its own precedent.

The second flaw in the Court's argument is its reliance on historical discrimination as proof that private homosexual intimacy is not an essential liberty. Sodomy laws, while often facially applicable to both

that there must be a realm of private morality and immorality which is simply not the law's business. Mill, *On Liberty*, in *THREE ESSAYS* (1975). The right of privacy also can be understood to be simply the right to be left alone. See Karst, *supra* note 1. Justice Stevens, in dissent, argued that the Court's precedent establishes an individual's right to make decisions which affect his and his family's destiny. He further asserted that precedent extends the right of privacy to nonreproductive sexual conduct by both married and unmarried adults. Since the Georgia statute facially proscribed both homosexual and heterosexual sodomy, it could not be enforced as written. Therefore, the State had the burden of justifying a selective application of its law. Since homosexuals must have the same liberty interests as heterosexuals, and bias and ignorance alone are not sufficient to justify selective application of the law; the State had not met its burden. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2857-59 (1986).

47. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986).

48. For a discussion of the grounds for the right of possession of pornography in one's home, see *supra* note 42.

49. See Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION* (1970). Noonan also discusses the impact of the law on morality.

Legislation which enforced slavery, for example, systematically formed American moral judgments about blacks. Court decisions which required desegregation shaped a new conscience for blacks and whites. Law prohibiting abortion had taught a view of life and responsibility, and the law cannot be abolished without substantial impact on the moral consciousness of Americans.

Noonan, *Introduction*, in *THE MORALITY OF ABORTION* x, xi (1970). According to Noonan's argument, *Hardwick*, which sanctions anti-homosexual laws, encourages private prejudice against homosexuals.

homosexual and heterosexual sodomy, in effect proscribe a primary form of sexual intimacy of only homosexuals. Furthermore, the Court explicitly refused to consider the constitutionality of sodomy laws as applied to heterosexuals. Therefore, when the Court stated "proscriptions against that conduct have ancient roots," the proscribed "conduct" at issue was the intimate sexual behavior of homosexuals alone. It is inconceivable that even the present Court would explicitly rely on historical discrimination against blacks and women, even in the form of facially nondiscriminatory laws, to determine which of their liberties are essential and which are not.

B. *Watkins*: Homosexuals as a Suspect Class

The *Hardwick* holding was tainted by the Supreme Court's own precedent. The *Watkins* opinion is similarly marred by *Hardwick*. To achieve an intuitively just result, the court arguably distorted the message of *Hardwick*. In doing so, the court made two unsupportable assumptions: (1) *Watkins* is distinguishable from *Hardwick* because the Army regulations discriminated on the basis of sexual orientation, or status, rather than conduct; and (2) *Hardwick* does not foreclose a finding that homosexuals are a suspect class under equal protection doctrine.

1. *The Status/Conduct Distinction*

The attempt to distinguish *Watkins* from *Hardwick* on the basis of status and conduct contains two flaws. First, the conduct which arguably defines the class is illegal.⁵⁰ Judge Reinhardt, in dissent, observed that homosexuals are different than other groups, such as women and blacks, who have received protection under the equal protection clause. Homosexuals are necessarily defined by their sexual conduct. Since that conduct may constitutionally be prohibited by the states, it is antithetical to assume the group has special protection under the Constitution.⁵¹ (While it may be argued that homosexuality encompasses sexual contact other than legally defined acts of sodomy, the result of the argument may necessarily be that only celibate homosexuals warrant constitutional protection.)

The second flaw in the status/conduct distinction is the court's argument that the focus of the Army regulations is homosexual orientation rather than conduct. The regulations do allow for discharge based solely on admission of homosexuality; however, they also permit

50. Congress has criminalized sodomy by military personnel in 10 U.S.C. § 925 (1982).

51. *Watkins v. U.S. Army*, 847 F.2d 1329, 1356-57 (9th Cir. 1988) (Reinhardt, J., dissenting).

discharge for homosexual acts alone.⁵² Moreover, the Army's asserted objective was to exclude those who engage in homosexual acts or are likely to engage in such acts.⁵³ The discharge of an admitted homosexual is consistent with that goal. The Army's policy of toleration of whimsical homosexual acts by heterosexual soldiers⁵⁴ is consistent with its desire to exclude only those who are likely to continue to engage in such activity.⁵⁵ Furthermore, Watkins had admitted to engaging in homosexual sodomy while in the Army.⁵⁶ In the majority's dismissal of Watkins's first amendment claim, it stated: "Since Watkins admitted in 1968 that he had engaged in homosexual acts, he was presumed under the regulations to have a homosexual orientation, and could not rebut that presumption because his orientation was, in fact, homosexual."⁵⁷

As Judge Reinhardt observed in dissent, "under the majority's status/conduct distinction, Watkins could be excluded from the Army based on regulations slightly more narrowly drawn so as to target only the class of persons who have engaged in homosexual conduct."⁵⁸ Although *Watkins* achieved a just result, the effect of the holding is limited.

2. *Homosexuals as a Suspect Class After Hardwick*

The Army argued that *Hardwick* precluded a finding that its regulations denied Watkins equal protection of the law. The *Watkins* court's response was: "The Court's holding was limited to this due process question. The parties did not argue and the Court explicitly did not decide the question whether the Georgia sodomy statute might violate the equal protection clause."⁵⁹ However, the court seemingly ignored the obvious; if the *Hardwick* Court saw a valid equal protection issue, they would have raised it.

[T]he procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. . . . It is a well settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."⁶⁰

52. *Id.* at 1336-38 n.11. The discharge and reenlistment regulations are alike on this point.

53. *Id.* at 1362 (Reinhardt, J. dissenting).

54. *Id.*

55. *Id.* at 1361-62 (Reinhardt, J., dissenting).

56. *Id.* at 1353 n.1 (Reinhardt, J., dissenting).

57. *Id.* at 1335.

58. *Id.* at 1361 (Reinhardt, J., dissenting).

59. *Id.* at 1339-40.

60. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2849 (1986) (Blackmun, J., dissenting) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)).

The *Watkins* court further assumed that *Hardwick* allowed state proscription of sodomy, but not homosexual orientation. (The Georgia statute facially applied to both heterosexual and homosexual sodomy.) This assumption ignores the explicit focus of the Court's opinion, which was *homosexual* sodomy. The Court stated that "majority sentiments about the morality of *homosexuality*" and the "presumed belief of a majority of the electorate in Georgia that *homosexual* sodomy is immoral" were adequate justifications for the law.⁶¹ In dissent, Justice Blackmun noted that Georgia's stated interest was the prosecution of *homosexual* sodomy despite the fact that the statute was equally applicable to heterosexual sodomy.⁶² Justice Stevens, in his dissent, noted that the Georgia Attorney General considered the statute to be unconstitutional if applied to a married, heterosexual couple.⁶³

Based on its erroneous assumption that *Hardwick* sanctioned state proscription of both homosexual and heterosexual sodomy, but did not permit state proscription of homosexual orientation, the *Watkins* court asserted: "While it is not our role to question *Hardwick's* concerns about substantive due process and specifically the right to privacy, these concerns have little relevance to equal protection doctrine."⁶⁴ The focus of the court's analysis was thereby shifted to whether the Army regulations had a disproportionate impact on a particular group. "The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression."⁶⁵ But majority oppression, in the form of coerced compliance with perceived popular codes of moral sexual behavior, is exactly what *Hardwick* seems to stand for.

The obsessive focus of *Hardwick* on homosexual sodomy alone, and the Court's refusal to consider the equal protection issue seem to preclude a finding that homosexuals are a suspect class.⁶⁶ In order to achieve a just result, the *Watkins* court blatantly misconstrued *Hardwick*. A 1987 D.C. Circuit case, which upheld the FBI's refusal to hire a person because she was a homosexual, gives a more honest appraisal of *Hardwick*. The court stated:

It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to

61. *Id.* at 2846 (emphasis added).

62. *Id.* at 2850 n.2 (Blackmun, J., dissenting).

63. *Id.* at 2858 n.10 (Stevens, J., dissenting). Justice Stevens also argued that the private sexual conduct of both married and unmarried heterosexual persons is protected under the due process right of privacy by the Court's own precedent. *Id.* at 2857 (Stevens, J., dissenting).

64. *Watkins v. U.S. Army*, 847 F.2d 1329, 1341 (9th Cir. 1988).

65. *Id.*

66. Judge Reinhardt also makes this point. *Id.* at 1353-56 (Reinhardt, J., dissenting).

state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.⁶⁷

Six states criminalize only homosexual sodomy.⁶⁸ It is improbable that the Supreme Court would invalidate these laws under equal protection doctrine given its holding in *Hardwick*. As Judge Reinhardt stated in *Watkins*: "The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear."⁶⁹

In reality, the *Watkins* majority hung its hat on two weak pegs: (1) the Army regulations exclude homosexuals for admitted homosexual orientation, not *only* homosexual acts; and (2) the regulations proscribe homosexual acts other than those commonly included in sodomy laws.⁷⁰ Even if *Watkins* cannot be discharged or denied reenlistment after the *Watkins* decision, it is a hollow victory for homosexuals in the Army. The Army must narrow the language of its regulations only slightly to meet the *Watkins* requirements.

There is no reason to suppose that *Watkins* will not continue to be forthright and candid with the Army. Under rewritten regulations he could easily be discharged again if he once more admits to engaging in acts of sodomy.⁷¹ After *Watkins*, homosexual soldiers are left in the same unjust dilemma: they can remain celibate or try to keep their sexual orientation a secret. In fact, the ultimate, practical design of Army regulations and state sodomy laws may be to keep gays and lesbians where certain segments of society think they belong—in the closet.⁷²

67. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). The *Watkins* court flatly disagreed with the *Padula* analysis. "Padula's reasoning . . . rests on the false premise that *Hardwick* approves discrimination against homosexuals." *Watkins v. U.S. Army*, 847 F.2d 1329, 1345 (9th Cir. 1988).

68. Miller, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 800, 801 (1984).

69. *Watkins v. U.S. Army*, 847 F.2d 1329, 1355 (9th Cir. 1988) (Reinhardt, J., dissenting).

70. The regulations also address forms of sexual contact such as kissing, holding hands, caressing, and hand-genital contact. *Id.* at 1346.

71. The Army may be barred from discharging or denying reenlistment to *Watkins* based on his past admissions due to its rules on double jeopardy. *See id.* at 1332 n.4.

72. In fact, the Army's asserted concern is that heterosexual prejudice against homosexuals within its ranks disrupts its affairs. The Army knows that homosexuals are in the ranks, but does not want their orientation to become known. *Id.* at 1350.

IV. *HARDWICK* V. *WATKINS*: A DICHOTOMY OF JUDICIAL PHILOSOPHY

Both *Hardwick* and *Watkins* grossly manipulate precedent: *Hardwick*, by its refusal to recognize that its prior line of privacy cases creates a larger category of fundamental rights than the narrow fact patterns the cases represent; *Watkins*, by its stubborn insistence that *Hardwick* leaves room to designate homosexuals a suspect class.⁷³ The judicial philosophy represented by these cases, however, is fundamentally different.

The *Hardwick* holding is an explicit statement that historical legal discrimination and majority notions of sexual morality are sufficient justifications for laws which deprive a minority of the right to engage in private, consensual sexual conduct.⁷⁴ To argue that the Court's holding does or does not also allow states to ban heterosexual sodomy begs the question. Sodomy laws deprive homosexuals of their primary forms of sexual expression; common forms of heterosexual intimacy are not criminalized. *Hardwick*, in effect, allows a presumed majority to criminalize conduct which largely defines the sexual identity of a large segment of our society. Sodomy laws, by their very existence, even if rarely applied, deny homosexuals the right to be first-class citizens.

In contrast, *Watkins* flatly rejects majoritarian notions of sexual morality as legitimate bases for state-sponsored discrimination. In response to the Army's assertion that gays in its ranks are a source of embarrassment and disruption, the court stated: "[T]he Supreme Court has decisively rejected the notion that private prejudice against minorities can ever justify official discrimination, even when those private prejudices create real and legitimate problems."⁷⁵ In answer to the Army's claim that its regulations reflected the moral consensus of society, the court responded: "Yet, even accepting *arguendo* this proposition that anti-homosexual animus is grounded in morality (as opposed to prejudice masking as morality), equal protection doctrine

73. The analysis of homosexuals as a suspect class by the *Watkins* court is itself apparently sound, and is in accord with prior Supreme Court applications of the doctrine. "The majority opinion concludes that under the criteria established by equal protection case law, homosexuals must be treated as a suspect class. Were it not for *Hardwick* . . . I would agree, for in my opinion the group meets all the applicable criteria." *Id.* at 1356 (Reinhardt, J., dissenting). See also *Bowers v. Hardwick*, 106 S. Ct. 2841, 2850 n.2 (Blackmun, J., dissenting), notes that Georgia's selective application of its sodomy law raises the issue of discriminatory enforcement. Thus, *Hardwick* may have had a claim under the equal protection clause with reference to the issue of whether homosexuals are a suspect class; Miller, *supra* note 68; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

74. See *supra* text accompanying notes 16-17.

75. *Watkins v. U.S. Army*, 847 F.2d 1329, 1350-51 (9th Cir. 1988).

does not permit notions of majoritarian morality to serve as compelling justification for laws that discriminate against suspect classes."⁷⁶

Hardwick and *Watkins* dramatically underscore a fundamental dichotomy in judicial philosophy: whether courts should merely reflect "majoritarian notions of morality" or whether courts should also protect disadvantaged groups from the moralistic prejudices of a majority. While one goal is surely more popular, the other seems more worthy.⁷⁷

V. CONCLUSION

Another fundamental issue is raised by *Watkins* and its response to the difficult precedent of *Hardwick*. Must courts obey precedent even when an apparently unjust result must follow? *Watkins* had served in the Army for fourteen years. His record was full of commendations. His officers had judged him to be an outstanding soldier. It would be unjust to allow the Army to banish him because he had been honest and forthright about his homosexuality. The *Watkins* court's tortured reading of *Hardwick* is a direct result of its duty to obey precedent. The dissent captured the essence of the court's dilemma:

I believe that the Supreme Court egregiously misinterpreted the Constitution in *Hardwick*. In my view, *Hardwick* improperly condones official bias and prejudice against homosexuals, and authorizes the criminalization of conduct that is an essential part of the intimate sexual life of our many homosexual citizens, a group that has historically been the victim of unfair and irrational treatment. I believe that history will view *Hardwick* much as it views *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896). And I am confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court.⁷⁸

Apparently, the *Watkins* decision, even if not overruled, will *not* result in any increased legal recognition of homosexuals as first-class citizens with first-class rights. However, the decision could be seen as an act of judicial disobedience. In this respect, *Watkins* echoes some of the historical slavery and civil rights cases. The final lesson of *Watkins* may be that sometimes a just result can be achieved despite the apparent confines of unjust precedent.

76. *Id.* at 1351.

77. Of course, these two philosophies are not mutually exclusive. All laws are arguably based on moral principles. The underlying distinction is that legal coercion is not justified to alter behavior which does not harm others—behavior that, in this instance, merely offends the sensibilities of a perceived majority. See Hart, *Immorality & Treason*, in *THE LAW AS LITERATURE* 220 (L. Blom-Cooper ed. 1961); Mill, *On Liberty*, in *THREE ESSAYS* (1975).

78. *Watkins v. U.S. Army*, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting).

ADDENDUM

Since the writing of this Note, *Watkins I* and *Watkins II* were withdrawn after full court review. The court held that the Army could not refuse to reenlist Watkins, but based its holding solely on equitable estoppel grounds.⁷⁹

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79. *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir 1989).